

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE ARANCIBIA,

Defendant and Appellant.

B240341

(Los Angeles County
Super. Ct. No. BA376549)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Stephen A. Marcus, Judge. Reversed.

David H. Goodwin, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David
E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

In this case we hold that allowing the jurors to translate for themselves the Spanish-language audio recordings of defendant's interrogations constituted structural error requiring reversal of defendant's convictions.

FACTS AND PROCEEDINGS BELOW

Defendant, a pastor of a small Christian church in Hollywood, was charged with molesting three girls, who were members of his church. The incidents continued for approximately a year, from November 2009 to September 2010, when the mother of one of the girls contacted police. Defendant was arrested in September 2010 and charged with violating Penal Code sections 288, 288.5, and 289.

At trial, the girls testified as follows.

1. A.B.

A.B. testified that when she was 12 years old defendant would pick her up in his van three times a week and take her to his church. The first time defendant kissed her on the lips in the van she thought it was by accident so she did not tell anyone. About a month later, however, defendant kissed her again on the lips and this time put his tongue in her mouth. After that, defendant tongue-kissed her about twice a week.

In addition to tongue-kissing, defendant would play what he called the "tickle game" with A.B. in the van and at his home. In the "tickle game" defendant would lie on top of A.B. and tickle her. He would also kiss her and move his erect penis against her vagina through her clothing. Afterward defendant would apologize to A.B. and tell her he would not do it again. But he kept doing it once or twice a month for 11 or 12 months. A.B. did not tell her mother because she was afraid that her mother would not believe her.

A.B. eventually told her mother and two of her mother's friends that defendant had been molesting her and Y.C., another young parishioner. When confronted by the parents of A.B. and Y.C., defendant admitted to kissing A.B. and playing the "tickle game" with her.

2. Y.C.

Y.C. is the same age as A.B. and also attended defendant's church. She testified that one day after church, while walking with defendant to his car, he kissed her on the lips. On another occasion Y.C. went to defendant's house after an argument with her mother. Defendant and one of his daughters played the "tickle game" with Y.C. on a bed. When defendant's daughter left the room, defendant kissed Y.C. and put his tongue in her mouth as she lay on the bed. He lay on top of Y.C. and pushed her legs apart. He rubbed his penis against her vagina through her clothes, kissed her neck and licked her naval. Afterward defendant told Y.C. to pray with him for God's forgiveness.

Several times defendant arranged to be alone with Y.C., and on those occasions he kissed her and put his tongue in her mouth, tried to lift her skirt, and pressed his penis against her buttocks.

Y.C. testified that she didn't tell anyone what defendant was doing to her because: "I didn't trust anyone." Nevertheless, at some point Y.C. told her mother and father about defendant's behavior, and her parents and A.B.'s parents confronted defendant with the girls' accusations. Defendant responded that he only touched the girls through their clothes and "that he hadn't raped them."

3. G.S.

G.S. testified that when she was 15 years old she attended defendant's church for about a month. During that time she lived with defendant and his family for a few weeks. While she was there defendant kissed her on her mouth, and once, when she was bathing, defendant entered the bathroom and asked her to kiss him. She told him to leave. Another time G.S. was sleeping on her bed when defendant came into the room and got on top of her.

During a camping trip with defendant, his family and other members of the church, defendant slept in the same tent as G.S. and other young girls. When the others were asleep, defendant woke G.S. and touched and kissed her breasts, penetrated her vagina with his fingers and moved her hand up and down his penis until he ejaculated.

4. Defendant's Interrogations

The Los Angeles police arrested defendant on September 30, 2010 and transported him to the Hollywood station where he was informed of his *Miranda* rights¹ and interrogated by Detective Daniel Aguirre and a social worker from the Department of Children and Family Services. The interrogation and defendant's responses were all in Spanish. The trial court permitted the prosecutor to play for the jury an audio recording of the interrogation and admitted the recording into evidence. The court also admitted a written English translation of the recording as well as a Spanish transcript. Both were distributed to the jury. In the English translation defendant admitted kissing A.B. and Y.C. but denied putting his tongue in their mouths or lying on top of them. He also admitted playing the "tickle game" with the girls but claimed that they always played on the carpet, never on a bed, and there was no rubbing of bodies.

Detective Juan Perez interrogated defendant later that same day. This interrogation also was conducted in Spanish. Again the prosecutor played an audio recording of the interrogation for the jury. The court admitted the recording as well as Spanish and English transcriptions, which were distributed to the jurors. In the English translation defendant denied any contact with the girls other than kissing them. He stuck to his denial even after Detective Perez told him, untruthfully, that the police had found his DNA on the clothing of one of the girls.

5. The Verdict and Sentence

The jury found defendant guilty of 12 counts of sexual abuse of minors and found true the special allegations that defendant committed the crimes against more than one victim and that he committed one of the counts by use of force or violence. The court sentenced defendant to an indeterminate term of 64 years 4 months to life. Defendant filed a timely appeal.

¹ *Miranda v. Arizona* (1966) 384 U.S. 436.

DISCUSSION

THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING JURORS TO TRANSLATE FOR THEMSELVES AND OTHER JURORS THE CONTENTS OF THE RECORDINGS

The prosecution introduced evidence of defendant's interrogation by Detective Aguirre through an audio recording and a written side-by-side, Spanish-to-English translation of the recording by a state-certified interpreter. Before the prosecutor played the tape and distributed the English translation to the jurors, the court instructed the jury: "The evidence in this case is the CD [i.e. the audio recording]. The transcript is offered to you as an aid to help you understand what's on the CD. However, I can't vouch for whoever transcribed that particular CD, and so it's not the actual evidence. The actual evidence is the tape itself."

The prosecution introduced evidence of defendant's interrogation by Detective Perez also by way of an audio recording and a side-by-side, Spanish-to-English translation by the same state-certified interpreter. Before the recording and the translation were placed in evidence, the court repeated its earlier instruction to the jury that the tape is "[t]he real evidence" and the English-language transcript is but "an aid" to understanding the tape. The court reiterated that it did not know who had prepared the transcript and that it could not vouch for the transcript's accuracy but that the jurors were "certainly allowed to use" the transcript to help them. The court concluded its instruction to the jury with the remark: "Obviously, the people who speak Spanish have a slight advantage."

The court erred in instructing the jurors that the Spanish-language recording, not the English-language translation, was "the evidence" and essentially inviting Spanish-speaking jurors to translate the recording for themselves and the non-Spanish-speaking jurors.² Further, the court should not have admitted the Spanish transcription

² Respondent contends that defendant waived this issue by not objecting to the court's instructions when given. No objection to an instruction is necessary where, as here, the defendant's substantial right to a jury trial is affected. (Pen. Code, § 1259.)

because it had no relevance but, like the recording (if given without proper instruction), was an invitation for the jurors to translate defendant's statements for themselves.³ The court compounded these errors by telling the jurors it could not "vouch for whoever transcribed" the interrogations when both transcripts show that they were translated by a state-certified translator.

Instead of the instructions given, the court should have instructed the jury with a modified version of CALCRIM No. 121, or its equivalent, which tells the jurors that they must accept the court interpreter's English translation of foreign language testimony. The Judicial Council's Bench Notes to that instruction recommend that, if a recording in a foreign language is used, the court should give the Ninth Circuit's model criminal instruction 2.8 which states: "You are about to [hear] [watch] a recording in the [specify the foreign language] language. A transcript of the recording has been admitted into evidence. The transcript is an official English-language translation of the recording. [¶] Although some of you may know the [specify the foreign language] language, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation contained in the transcript even if you would translate it differently." (Ninth Circuit Manual of Model Criminal Jury Instructions (2010) Criminal Cases, Jury Instruction No. 2.8; Judicial Council of Cal. Crim. Jury Instns. (2011) Bench Notes to CALCRIM No. 121, p. 22.)

A recording in English normally constitutes the evidence of what was said, and a transcript of the tape is used only as an aid in following and understanding the tape. If the tape and the transcript conflict, the tape controls. (*People v. Brown* (1990) 225 Cal.App.3d 585, 598-599.) However, when the tape is in a foreign language, the English translation controls and is the evidence of what was said. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 304.) Any other rule would be "nonsensical" and have

³ The recording itself might have been relevant, for example, to show whether the police coerced defendant's statements or to show his demeanor. But such admission would require a limiting instruction.

“the potential for harm where the jury includes bilingual jurors.” (*U.S. v. Fuentes-Montijo* (9th Cir. 1995) 68 F.3d 352, 355-356; accord, *People v. Cabrera, supra*, 230 Cal.App.3d at pp. 303-304.)

Here, a substantial danger exists that, given the court’s instructions and comments to the jury, if the jury included Spanish-speaking members (more than a reasonable probability since the trial was held in downtown Los Angeles), some of them may have interpreted the recording for themselves and for other members of the jury. Allowing the jurors to select for themselves the versions of defendant’s interrogation on which to base their verdict was equivalent to allowing each of the 12 jurors to consider evidence not presented at trial.

It is impossible to ascertain whether some of the jurors did in fact stray from the English translation provided by the state-certified interpreter and, if so, whether defendant was prejudiced. A showing of prejudice, however, is not required when the error interferes in a fundamental way with the full exercise of a constitutional right such as the right to trial by jury under the Sixth Amendment. (See *Parker v. Gladden* (1966) 385 U.S. 363 and *Turner v. Louisiana* (1965) 379 U.S. 466 [permitting unauthorized contact with jury]; *U.S. v. Noushfar* (9th Cir. 1996) 78 F.3d 1442 [sending tapes that had not been played for the jury into the jury room]; *People v. Butler* (1975) 47 Cal.App.3d 273 [refusing to reread incorrectly heard testimony].) As the court observed in *People v. Butler*, “It requires little imagination to realize that testimony which cannot be heard and *understood* by the jury can be neither probative nor substantial.” (*People v. Butler*, at p. 284, italics added.)

In this case, the court’s error undermines one of the fundamental tenets of our justice system—that a defendant’s conviction may be based only on the evidence presented at trial. (*People v. Cabrera, supra*, 230 Cal.App.3d at p. 303.) Accordingly, the judgment must be reversed.

DISPOSITION

The judgment is reversed.

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ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.